

# Poland

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The Covid-19 pandemic has undoubtedly changed the rules of doing business. Businesses had to adapt to the new reality practically overnight. Numerous restrictions on the freedom of business activity caused financial

problems for entire industries and sectors of the economy.

In Poland, as in many other countries, in order to limit the economic and social effects of Covid-19, businesses received financial aid from the state budget, which was aimed at maintaining jobs and preventing a wave of bankruptcies.

In addition, a new solution has been introduced into the restructuring law to make it easier for debtors in financial difficulty to complete the restructuring process quickly.

As it turned out, this solution has changed restructuring practice in Poland.

## Changes to the restructuring law

In June 2020, one of the anti-crisis shields introduced a separate restructuring procedure (the so-called 'simplified restructuring proceedings'). This change enabled the debtor to initiate and conduct restructuring proceedings practically without court review. This procedure was deformed to the maximum extent possible.

To commence the proceedings, it is enough for the debtor to announce the opening of restructuring proceedings in *Monitor Sądowy i Gospodarczy*. From this date onwards, the debtor is protected against enforcement by all creditors. As of this date too, it is prohibited to terminate any contracts considered key for the debtor, such as leasing, loan, rental or lease agreements.

Suspension of all enforcement proceedings and the possibility of terminating contracts remain in place for four months from the date of the announcement of the opening of restructuring proceedings.

It is the legislator's intention that within this period the debtor should conclude agreements with creditors and file

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an application with the court for approval of the arrangement.

The simplified restructuring proceedings have transferred control over the course of the procedure entirely to the debtor, who will be left with both his own management over the enterprise and the right to select a restructuring advisor of his choice who will support and, according to the legislator's

intention, control the course of the restructuring procedure.

The position of creditors and their impact on the opening and course of restructuring proceedings have been marginalised. Even in a situation where creditors are not interested in the arrangement, on the basis of his own individual decision the debtor may open the restructuring proceedings and block any actions by the creditors. Considering that the role of the court is confined to possible approval of the arrangement at the final stage of the restructuring proceedings, control over the proceedings rests entirely with the debtor.

Given that simplified arrangement proceedings are designed so favourably for the debtor, it is not surprising that they are currently the most popular restructuring method and accounted for about two thirds of all restructuring proceedings in Poland in 2020, while in 2021 this proportion has already reached 80%.

These proceedings were introduced as a temporary measure. Initially, debtors could avail of this option until June 30 2021. In a situation that saw the greatest economic difficulties related to the pandemic, it was possible to justify such privileging of the debtor.

Nevertheless, as often happens in life, makeshift solutions turn out to be quite permanent. Now, the effective period of the act has been extended until November 30 2021, and from December 2021, the main assumptions will be permanently implemented into the restructuring law.

### Effects of public aid granted to businesses

A somewhat surprising effect of the public aid granted to businesses during the Covid-19 pandemic in Poland was the drop in the number of bankruptcies in 2020.

As statistics show, this is a regular pattern not only in Poland but also in other European countries. The drop in the number of bankruptcies is mostly attributed to the huge financial support provided by the governments to counter the economic effects of Covid-19. However, in many cases, following the absorption of public aid due to the changes in the manner of conducting business activity (which are often of a permanent nature), some entities will not regain their financial balance and will go bankrupt. Due to the pandemic, customer preferences have changed. Therefore, some

businesses will not be able to adapt and will declare bankruptcy or require restructuring.

Therefore, it seems that in Poland, the statistics on the number of new bankruptcies and restructuring procedures will continue to grow, which seems to be reflected in the statistics for the first half of 2021, according to which the number of bankruptcies is indeed growing.

The increase in the number of bankruptcies will be a result not only of the depletion of funds from direct public aid for businesses, but will also result from the increase in the tax burden of economic activity, which will most likely occur at the beginning of 2022. Tax increases for businesses are part of the new government program, the so-called 'Polish order'.

Hence, the number of bankruptcy and restructuring cases will grow, but this increase will be spread out over time.

The specific character of the Polish situation as regards combating the Covid-19 pandemic was the introduction by the Polish government of restrictions on business activity by means of regulations, i.e. legal acts of a relatively low rank within the Polish legal system. This practice – criticised already at the time the regulations were issued – seems to have been unlawful in the light of court judgments currently being issued in Poland. It follows from these judgments that restrictions on conducting business activity should be introduced only by means of a statute. The current line of jurisprudence, unless it changes, will have huge implications for the legal situation in Poland because entire industries closed or otherwise affected by the lockdown will be able to take legal action to claim damages from the Polish state.

### Legal framework of restructuring

In Poland, restructuring law – as a separate area of law – has only relatively recently been individually regulated in an autonomous legal act. The Restructuring Law was passed in 2015, and the act itself entered into force at the beginning of 2016.

Admittedly, it had been possible before for a debtor to conclude an arrangement with creditors, but only as part of the bankruptcy procedure in accordance with the Bankruptcy Law. In practice, the provisions concerning the possibility of concluding an arrangement under bankruptcy proceedings did not meet the parties' expectations because by the time the

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conditions for declaring bankruptcy were met, it was usually too late to initiate the arrangement procedure and for the enterprise to recover from the crisis.

With the introduction of the Restructuring Law in Poland, the previous systemic assumptions have been changed. Under the new regulations, a change has occurred regarding the principle that in bankruptcy or restructuring proceedings the interests of the creditors are to be secured first, and only afterwards are the debtor's interests considered.

This change in priorities is becoming clearer with each new amendment to the restructuring law in Poland such as the above-mentioned regulation on simplified restructuring proceedings.

The shift from the principle of creditor protection to the principle of debtor protection is, in a way, the result of the implementation of EU law (the so-called 'second chance directive'). Choosing primacy of debtor protection over the creditor's interests has significant social and economic consequences. Cheap and quick debt relief procedures change ethical attitudes in business, promoting irresponsibility and gambling-like approaches.

Despite these reservations, the doctrine of so-called 'second chance' or 'new beginning' is becoming well-established

both in European and Polish law. Without denying the need to introduce regulations to protect debtors and allow them to return to the market, this process should not be carried out at the expense of the legitimate interests of creditors. Meanwhile, bankruptcy has become one of the strategies for dealing with financial problems.

Legislators both in Poland and in other parts of Europe seem to ignore the negative impact of excessively liberal regulations on ethical attitudes in business. They seem to focus on arguments related to alleged job protection, as though only debtors – but not creditors – were creating jobs.

This attitude of moral hazard was aptly summed up by Alan Greenspan, the former president of the US Central Bank, who pointed out that “the number of bankruptcies is growing because Americans have lost their sense of shame”.

### **Types and course of restructuring in Poland**

In principle, Polish law distinguishes four types of restructuring proceedings:

- 1) Arrangement approval proceedings;
- 2) Fast-track arrangement proceedings;
- 3) Ordinary proceedings; and
- 4) Remedial ('sanation') proceedings.

According to the legislator, the introduction of four types of proceedings was designed to ensure a choice of the form

of restructuring that would be best for a specific business. Nevertheless, it causes unnecessary complications in the restructuring processes, all the more that the rules for all of these proceedings are basically the same.

In all cases:

- The proceedings cover all debt which arose before the opening of the restructuring proceedings;
- The debtor is obliged to pay – on an ongoing basis – any debts that arise after the opening of the proceedings;
- After the proceedings have been opened, the restructuring plan and arrangement proposals are prepared;
- Creditors vote on the arrangement, which is then approved by the court; and
- Approval of the arrangement is followed by the implementation phase.

In the first three cases, only the debtor may file an application and initiate restructuring proceedings, and the rule is to preserve his management rights. Only in the case of remedial proceedings is it possible for creditors to submit an application. Additionally, in remedial proceedings, the rule is that the debtor is deprived of the management on his entire property. Remedial proceedings are intended for the 'most severe cases' in which deep restructuring is needed, including the sale of part of the debtor's assets.

On the debtor's part, the opening of the restructuring proceedings results in a prohibition on paying back the debts covered by the arrangement (i.e. those that arose before the opening of the restructuring proceedings) and in enforcement immunity protecting the debtor's assets. Pending enforcement proceedings are suspended by operation of the law. Creditors cannot initiate new enforcement proceedings against the debtor's assets. At the debtor's request, the court may revoke divestments of the debtor's assets made by the creditors.

The restructuring process is aimed, in principle, at preserving the debtor's property, not at selling it. The restructuring law provides for the procedure of selling the debtor's assets with the consent of the judge-commissioner only in the case of recovery proceedings. This sale has the effect of an enforcement sale and causes the security on the debtor's property to lapse.

### Pre-pack

However, if the debtor's restructuring is to involve the sale of the debtor's enterprise, the provisions of bankruptcy law – which allow for the so-called 'pre-pack' – can be applied. To this end, the debtor or any of his creditors may apply to the court for an approval of the terms of sale of the debtor's enterprise (or its organised part) to a designated buyer.

The application for approval of the terms of sale should be accompanied by a proof of payment of the tender guarantee in the amount of one tenth of the offered price and an estimate of the value of the enterprise (or its organised part) prepared by a person entered on the list of court experts. The court accepts the application for approval of the terms of sale if the price is higher than the amount obtainable in bankruptcy proceedings, less the costs of the proceedings and other liabilities of the bankruptcy estate that would have been incurred in such liquidation.

### Liability of management board members for the company's obligations

Pursuant to Polish law, management board members are required to file a bankruptcy petition with the court no later than 30 days from the date on which the grounds for declaration of bankruptcy occurred.

There are two prerequisites for bankruptcy: failure to settle due liabilities for at least three months, or when the value of liabilities is higher than the value of the debtor's assets. Members of the management board are liable to creditors for damage caused as a result of a failure to submit the application within the above-mentioned period, unless they are not guilty

of failure to submit the application or if, within 30 days of the date when the prerequisites for bankruptcy are met, restructuring proceedings were opened against the debtor or an arrangement was approved in the arrangement approval procedure.

If the members of the company's management board fail to file a bankruptcy petition within the above-mentioned period they are liable with their personal property for the company's obligations towards creditors, as well as for public law obligations.

### Liability of creditors

In order to prevent creditors from submitting unjustified bankruptcy petitions, a regulation has been introduced that allows such a creditor to be charged with the costs of the proceedings, and the court may order such a creditor to issue a public statement with appropriate content and in an appropriate form. Additionally, the debtor may pursue claims for damages from the creditor.

### Protection of the bankruptcy estate

In order to protect the bankruptcy estate and prevent negative actions by the debtor

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(such as paying off only selected creditors), Polish law provides that legal actions performed by the debtor within a year before the filing date of the bankruptcy petition through which it disposes of its assets are deemed ineffective if they were made free of charge or for a fee, but where the value of the debtor's services significantly exceeded the value of the benefit received by it. Similarly, all legal actions taken by the debtor within the six months before the bankruptcy petition filing date involving the debtor's family or related entities are deemed ineffective.

It is also possible for the remuneration of the managerial staff or key employees of the debtor to be deemed ineffective if they are not justified by the amount of their actual work. Similarly, it is possible for securities established on the debtor's assets within six months before the date the bankruptcy petition is filed to be deemed ineffective.

### **Financing of restructuring proceedings**

In practically all restructuring proceedings, to be implemented effectively it is necessary to provide an external source of financing, which is when an entity is already experiencing financial difficulties.

In order to make it easier to find potential financing, Polish restructuring law provides for privileges for entities that will assume the risk of granting financing during the restructuring process. Such an entity may be granted more favourable terms of repayment of its debt than other creditors, and it is also possible to establish security for such financing on the debtor's assets during the restructuring proceedings.

In the event of a failure of the restructuring proceedings and debtor's declaration of bankruptcy, such debts are satisfied in a higher category of satisfaction than the debtor's other receivables.

### **Separate procedures**

Separate proceedings are provided concerning developers and bond issuers. In the case of developers, the introduction of a separate procedure results from the legislator's intention to secure the interests of one group of the developer's clients, namely natural persons who have concluded agreements with the developer concerning building and transfer of the ownership of residential premises.

In the case of bond issuers, the justification for a separate regulation is the need to ensure the protection of bondholders, as well as to ensure their uniform representation because of the fact that bond issues are often dispersed and targeted at an undefined group of entities. As regards bankruptcy proceedings, there are separate proceedings for banks and consumers, i.e. natural persons acting outside the scope of an economic activity.

### **Cross-border regulations**

As regards bankruptcy and cross-border restructuring, the provisions of Polish law are compatible with Regulation (EU) 2015/848 of the European Parliament and of the Council of May 20 2015, according to which Polish courts have exclusive jurisdiction over restructuring cases in which the debtor's principle place of business is located in the Republic of Poland.

Polish courts also have jurisdiction if the debtor conducts business in the Republic of Poland or has a place of residence, registered office, or property in the country. Creditors who have their place of residence or registered office abroad enjoy the same rights in restructuring or bankruptcy proceedings as creditors whose place of residence or registered office is located in Poland. The opening of restructuring proceedings abroad does not preclude the opening of such proceedings in Poland if an entity has its branch in the country.

Therefore, there are no obstacles to opening bankruptcy proceedings in Poland against a foreign debtor if any of its assets are located in Poland. In the event of a declaration of bankruptcy of a foreign debtor which has its assets in Poland, it is also possible to recognise a bankruptcy decision issued by a foreign court. The result of such recognition will be a declaration of bankruptcy with regard to assets located in Poland.

### **A look to the future**

It seems that the role of the restructuring law will increase due to the increasingly liberal approach of the legislator to the so-called 'second chance'. Other effects will be an increase in the number of restructuring proceedings, as well as the removal of the social odium from an entity that does not pay debts.

The role of simplified restructuring as the fastest and most informal form of restructuring will continue to grow. The lack of uniform jurisprudence may become a problem in the development of restructuring in Poland. Restructuring proceedings are conducted in district courts, which are the lowest courts in the hierarchy of courts in Poland. Appeals against their decisions are processed by regional courts. Due to the exclusion of the possibility of submitting cassation appeals to the Supreme Court at the level of regional courts (of which there are 46 in Poland), different judgments are made with reference to the same legal issues, which causes considerable legal uncertainty.

It is also probable that in the near future, the number of bankruptcies will increase due to the expiry of the aid programmes for businesses that were launched during the pandemic. In addition, the likelihood of this scenario is supported by the significant state indebtedness as a result of Covid-19 and, consequently, an increase in taxes, whether direct or indirect.